STATEMENT OF THE CASE

Appellant Jose Mendoza Gonzales was arrested on or about February 5, 2002, in Dallas County, Iowa, for Possession of Methamphetamine with Intent to Distribute, Possession of Marijuana with Intent to Distribute, and Conspiracy to Distribute Drugs, in violation of Title 21, United States Code, Sections 841(a)(1), 841 (b)(1)(A), 841 (b)(1)(B), Section 846, and Title 18, United States Code, Section 2. He was also charged with Illegal Alien, without Consent of Attorney General, Being Found in the United States Following Deportation, in violation of Title 8, United States Code, Sections 1326(a) and 1326(b)(2), which was severed from the trial proceeding.[1] A co-defendant, Jesus Mendoza Gonzales was simultaneously charged with the same offenses. (Indictment) (App. pp.).

A Suppression Hearing held on August 22, 2003. Trial commenced in this case on December 2, 2002, Defendant pled to the Illegal Alien and Reentry offense on January 31, 2003, and Sentencing occurred on May 6, 2003.

Timely Notice of Appeal was filed on May 13, 2003.

SUMMARY OF THE ARGUMENT

Defendant, Jose Mendoza Gonzales, was subjected to an unlawful search and seizure of his truck and wrongfully charged with possession of and conspiracy to distribute methamphetamine and marijuana. This case presents a multitude of

[1] Defendant is not appealing the plea to the Illegal Alien and Reentry charge.

questions: (1) must an inspecting officer be specific as to the level of the inspection, insuring a driver is given adequate notice concerning the extent of the inspection; (2) once notice of an inspection is provided, where does officer discretion end, and the requirement for consent begin; (3) is consent necessary to search a storage compartment, located beneath the sleeper berth mattress and a separate hinged lid; (4) if consent is necessary, whether Defendant's comment of "I have nothing to hide" amounts to a knowing and voluntary consent to the search of the area; and, (5) absent an interpreter, did Defendant clearly understand what Officer Burke was saying to him.

There was inadequate evidence offered to prove beyond a reasonable doubt that Defendant knowingly possessed marijuana or methamphetamine or that a conspiracy existed. Also, trial counsel was ineffective in his representation due to a failure to provide a meaningful defense and for failing to object to sentencing enhancements.

I. THE LOWER COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS: THERE WAS NO CONSENT TO SEARCH, AND OFFICERS CONDUCTED AN ILLEGAL INTERROGATION WHILE HE WAS IN CUSTODY IN VIOLATION OF HIS FOURTH AMENDMENT CONSTITUTIONAL RIGHTS

Standard of Review – denial of motion to suppress

We review facts supporting the denial of a motion to suppress evidence for clear error and review the legal conclusions based on those facts de novo. See

United States v. Beatty, 170 F.3d 811 (8th Cir. 1999). Under *Maryland v. Buie*, 494 U.S. 325, 337, 108 L. Ed. 2d 276, 110 S. Ct. 1093 (1990),

Standard of Review – no consent to search

A district court's finding that a consent to search was given voluntarily is reviewed for clear error. *See United States v. Chaidez*, 906 F.2d 377, 380 (8th Cir. 1990). The government must prove voluntariness of consent to search by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974). The proper test is whether the totality of the circumstances demonstrates that the consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

Argument

The prosecution contends that Defendant consented to a search of his truck. Defendant argued at his suppression hearing, that he did not. The Court ruled that Officer Burke provided notice to Defendant of the inspection, by asking if he could "search the truck during the inspection," and that the Defendant's response of "I have nothing to hide" amounted to a "voluntary" consent to search. (Order pp.2, 7-8) (App. pp.).

Timely objections were also raised throughout the trial. The totality of the circumstances would show that there was no voluntary and knowing consent to search.

The arresting officer, Officer Kenneth W. Burke works for the Iowa Department of Transportation Motor Vehicle Enforcement. (S.T. 8:17-18) (App. pp.).[2] Prior to this, he was employed as a sergeant for the Madison County Sheriff's Department for fifteen years, which included considerable work in the narcotics division. (S.T. 8:21-25, 9:1-17) (App. pp.).

On or about February 5th, 2002, Officer Burke did, what he referred to as, a level two inspection on Defendant's truck. (S.T. 12:20-25) (App. pp.). A "level two inspection" includes the paperwork associated with a commercial vehicle, license, registration and permits, as well as, safety equipment on the truck, lighting, equipment inside the truck, general condition of the truck. (S.T. 11:19-25, 12:1) (App. pp.). Officer Burke agrees that while doing an "inspection" he "can only look at certain things by the federal code that they are required to have." (S.T. 14:15-16) (App. pp.). Officer Burke testified that he believed he could conduct an inspection, even where there are no apparent violations. (S.T. 11:12-17) (App. pp.). However, if there is something that has nothing to do with the inspection process, he asks for permission to search the truck. (S.T. 14:16-22) (App. pp.). Officer Burke used the example of a "glove box" as an area he cannot search in relation to a safety inspection. (S.T. 40:3-6) (App. pp.). He stated of "there is a package in the truck, a piece of luggage or box or paper sack" that has nothing to

[2] S.T. refers to Suppression Hearing Transcript materials, T.T. refers to Trial Transcript materials and Sent. T. refers

do with the inspection process, he asks if he can search those areas. (S.T. 17:22) (App. pp.).

Officer Burke gave contradicting testimony between the suppression hearing and trial concerning the alleged consent by Defendant. At the suppression hearing he testified that he "spoke inside the scale" when he asked Defendant if he had "any alcohol, any weapons, any narcotics, any guns, knives." (S.T. 42:21-25, 43:1-4) (App. pp.). Officer Burke testified at that hearing that the conversation was more than a "very short request" and that he actually "asked several things." (42:23-25) (App. pp.). He testified that he questioned Defendant further, "[d]o you mind while I'm doing my inspection if I were to look for those items?" (S.T. 43:6-7) (App. pp.). Burke testified that Defendant said, "I have nothing to hide." (S.T. 43:7-8) (App. pp.).

Yet, at trial, Officer Burke testified that "as I was walking to the parking lot I asked him then . . ." (T.T. 21:11-12) (App. pp.) and again stated, "as [they] were walking towards the truck" he asked if "there was anyone else in the truck" and if "there was any weapons, firearms, alcohol, or radar detectors in the truck." (T.T. 22:13-20) (App. pp.).

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to Sentencing Transcript materials.

There is a significant difference between discussing the issue of a voluntary and knowing consent indoors at a scale office, and walking outdoors at a weigh station towards a truck. The extrinsic noise level would be considerably different.

Defendant testified at the suppression hearing that Officer Burke originally wrote him a ticket for violations in his logbook, gave him his papers back and left. (S.T. 67:20-22) (App. pp.). Officer Burke then returned, took the ticket back, put it in the trash, and asked Defendant if he "got a DOT inspection?" (S.T. 67:23-25) (App. pp.).

Officer Burke asked Defendant for the DOT number and was looking for it on his windshield. (S.T. 68:7-13) (App. pp.). Officer Burke said, "I am going to go look at your truck for the DOT sticker in the windshield." (S.T. 68:14-19) (App. pp.). This was asked as they were walking towards Defendants truck. (S.T. 68:20-21) (App. pp.).

At the truck, Officer Burke asked who was with Defendant. (S.T. 68:21-22) (App. pp.). Defendant testified that he told Officer Burke that his brother was asleep, that he drives the night shift, and he couldn't be woken up. (S.T. 68:21-25) (App. pp.). Officer Burke informed Defendant that he was going to "go inside" and had him step aside. (S.T. 69:11-15) (App. pp.). Defendant testified that Officer Burke never said to him, "while I am doing the safety inspection may I search your truck." (S.T. 69:15-19) (App. pp.). Defendant never made a

statement to Officer Burke that gave him permission to search his truck. (S.T. 69:20-22) (App. pp.). Defendant never said he "had nothing to hide." (S.T. 70:1-3) (App. pp.). Officer Burke told him to "stand on the side" and went into the truck. (S.T. 70:5-8) (App. pp.).

Under the totality of the circumstances, Officer Burke's own testimony would confirm that it is questionable whether there was a knowing and voluntary consent. When he was asked:

Q: Okay. But did [Defendant] ever say, "Yes, you may search my truck"? Officer Burke testified:

A: To say specifically, "Yes, you may search my truck," no. (S.T. 43:14-15) (App. pp.).

The Court did not address the issue of the fact that Defendant is Hispanic and that Officer Burke could not speak Spanish. Officer Burke testified that all communications with Defendant were conducted in English. (T.T. 19:8-17) (App. pp.). While Officer Burke testified that *he* could understand Defendant, no where does he state that he confirmed Defendant understood him. (T.T. 19:14-15) (App. pp.) (emphasis added). The issue of whether Defendant understood clearly, was raised in his Motion to Suppress.

A defendant who has difficulty with the language has a right to an interpreter. *See Luna v. Black,* 772 F.2d 448 (8th Cir. 1985); and *United States v. Gallegos-Torres,* 841 F.2d 240, 242 (8th Cir. 1988).

It is doubtful Defendant understood Officer Burke as well as Officer Burke testified he understood Defendant. Defendant had an interpreter present at his Suppression Hearing. (S.T. 60:14-18) (App. pp.). He had an interpreter at Trial. (T.T. 7:23-25) (App. pp.). At sentencing he had an interpreter and at one point, the interpreter interjected "Your Honor, the interpreter is unable to keep up pace with counsel," and the government attorney had to "start at the top." (Sent. T. 4:18-22) (App. pp.).

The entire record and the "totality of the circumstances" in this case, is devoid of any showing that there was a knowing and voluntary consent. Consent to search is an exception to the warrant requirement of the Fourth Amendment. *See Sschneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973). It is well established that consent must be knowing and voluntary. *Id.*

In the case at hand, the government failed to prove by a preponderance of the evidence that Defendant's consent was voluntary and knowing. Officer Burke should have obtained a Spanish written consent from Defendant. He is an experienced law enforcement officer. (S.T. 9:2-17) (App. pp.). He testified that

he knew the importance of a consent being "knowing and voluntary." (S.T. 42:3-8) (App. pp.).

In the present case, the government seems to be arguing first of all, that Defendant consented to a search. Then it argues, but, even if he didn't, it was really only a safety inspection anyway, and consent wasn't needed.

The Court in the case at hand seems to agree. It ruled that the regulations in force in Iowa, and pursuant to which Officer Burke testified the inspection was commenced, allowed Officer Burke to search the lid-covered compartment located under the mattress of the sleeper area of Defendant's truck. (Order, pp. 5) (App. pp.). The rationale of the Court was that because a "restraint system" in the sleeper compartment was "not readily visible" and "had fallen into the storage compartment below the sleeping berth mattress," Officer Burke was justified in his search of the area for the purposes of completion of his safety inspection. (Order pp. 7) (App. pp.).

Even if Officer Burke was proceeding to do a safety inspection, as the government argued, his method is questionable. In *New York v. Burger*, 482 U.S. 691, 702-03, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987), the Supreme Court held a warrantless search of closely regulated industries is constitutional if, *inter alia*, the rules governing the search offer an adequate substitute for the fourth amendment warrant requirement. In order to do that, the rules must do two things: they must

provide notice to owners that their property may be searched for a specific purpose, and they "must limit the discretion of the inspecting officers." *Id*. at 703.

As soon as Officer Burke asked Defendant for the “paperwork associated with a commercial vehicle, driver’s license, registration and permits”, the “inspection” had essentially begun. (S.T. pp. 11:19-23) (App. pp.). Although Officer Burke testified that he informed Defendant that he was going to conduct an “inspection” of his truck, he did not state that he told Defendant the “specific purpose” of the area to be searched or, which level of inspection he was going to conduct. (S.T. pp. 14:9-10) (App. pp.).

It is clear, from his own testimony, that Officer Burke was planning to do a full search of the vehicle separate from the “inspection process” because he testified that he asked Defendant for “permission.” (S.T. 15:2-4) (App. pp.). Undoubtedly, he also knew that a valid “consent” to search was necessary, because he testified that he sought permission. (S.T. 15:2-4) (App. pp.). Clearly, valid consent was necessary, to proceed further.

The record would show that Officer Burke’s inspection process was merely a pretext to conduct an illegal search. Although he testified that he was doing a safety inspection – which should be to check items such as fire extinguishers, warning triangles, extra fuses – (S.T. 18:9-11) (App. pp.) – he went directly to

the sleeper berth, lifting the lid to the storage compartment area under the bed. (S.T. 24:3-7) (App. pp.).

The Supreme Court has warned against administrative stops becoming pretexts for "crime control," *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000). The rummaging through a person's belongings is more likely to serve the purpose of "crime control" than the enforcement of a regulatory scheme. *U.S. v. Knight,* 306 F.3rd 534, 537 (8th Cir. 2002).

Even before he lifted the lid for an "inspection," Officer Burke admitted that there was not "any part of the safety restraint device" which was beneath the lid of the container, which needed to be inspected. (S.T. 26:12-15) (App. pp.). He further testified that if the belts did fall in the "back" it could have occurred when he lifted the bed lid. (S.T. 26:1-25) (App. pp.). Clearly, the only reason Officer Burke started his "inspection" in the sleeper berth, was for an opportunity to "rummage through" Defendant's belongings.

In the Eighth Circuit's judgment, a search is justified only if it is explicitly authorized by a valid warrant or if it is supported by probable cause. *Knight,* 306 F.3rd at 537.

The Supreme Court has held that an officer who has the authority to search a vehicle may search all containers in it that are capable of concealing the object of

the search. *See Wyoming v. Houghton*, 526 U.S. 295, 302, 143 L. Ed. 2d 408, 119 S. Ct. 1297 (1999); *see also United States v. Ross*, 456 U.S. 798, 820-21, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982). The Supreme Court has further held, however, that an officer may search all containers in a vehicle capable of concealing the object of the search only when he or she has probable cause to search the vehicle. *See generally Houghton*, 526 U.S. 295, 143 L. Ed. 2d 408, 119 S. Ct. 1297; *Ross*, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157; *see also United States v. Sample*, 136 F.3d 562, 564 (8th Cir. 1998).

The rationale for this rule is that the probable cause that justifies the search of a vehicle also justifies the search of the containers within the vehicle that could conceal the object of the search. *See Ross*, 456 U.S. at 824. The idea being, that if suspicion of contraband justifies searching a lawfully stopped vehicle, then that very same suspicion justifies searching a container in the vehicle that is capable of containing contraband. *Id.*

But in the case at hand, as in *Knight,* the officer's testimony would show that the authority which he relied on to search Defendant's truck, was based not on probable cause, but on a regulatory statute. *Knight*, 306 F.3d at 536. While the regulatory statute serves the function of a warrant by explicitly limiting the "time, place, and scope" of the authorized search, it does not provide probable cause. *Knight,* quoting *Burger*, 482 U.S. at 703 (internal quotations omitted), at 536.

If there is no probable cause to search, there must be a warrant. *Knight,* 306 F.3rd at 537.

At the time the actual search of Defendant's truck was conducted, Officer Burke did not have probable cause to search closed portions of Defendant's truck – and he knew he did not have the authority. A search of the storage area below the mattress, is akin to a glove box – and area which cannot be searched pursuant to a safety inspection.

As in *Knight,* because the officer's search was neither authorized by warrant nor supported by probable cause, it violated the defendant's fourth amendment rights. All evidence obtained should have been suppressed. This case should be remanded to the District Court and a new trial had.

Standard of Review - Defendant did not have his *Miranda* warning read and was questioned while being detained

The voluntariness of a confession is a legal inquiry subject to plenary review by the appellate courts. *Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 452, 88 L. Ed. 2d 405 (1985). In determining whether a confession was voluntary we must examine the entire record for evidence that the statement was given under such circumstances which would indicate that the defendant was coerced or his will overborne. *Davis v. North Carolina*, 384 U.S. 737, 742, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895 (1966); see also *Rachlin v. United States*, 723 F.2d 1373, 1377 (8th Cir. 1983). In this analysis the court employs a flexible totality of the

circumstances approach, considering the specific interrogation tactics employed, the details of the interrogation, and the characteristics of the accused. *Rachlin*, 723 F.2d at 1377. Custodial statements are presumed involuntary and the government must overcome the presumption by a preponderance of the evidence. *Tippitt v. Lockhart,* 859 F.2d 595, 597 (8th Cir. 1988), cert. denied, 490 U.S. 1100, 109 S. Ct. 2452, 104 L. Ed. 2d 1007 (1989).

Argument

Defendant was not free to leave and should have had a *Miranda* warning prior to *any* questions from officers. A suspect is deemed "in custody" and entitled to *Miranda* warnings when he has been formally arrested or when he is "deprived of his freedom of action in any significant way." *See Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

Officer Burke testified that once he discovered a "suspicious package" he took Defendant back to the scale building and handcuffed him. (S.T. 16:22-25, 17:1-7) (App. pp.). After searching further, Officer Burke returned to the scale building and told Defendant that he was "under arrest for possession of marijuana" and contacted his immediate supervisor and a state Division of Narcotics Enforcement officer. (S.T. 19:6-10) (App. pp.).

While the lower court correctly suppressed Defendant's responses to Officer Caudle's questioning, *after* Defendant stated "I am going to jail," this statement

also should have been suppressed. (Order, pp. 11) (App. pp.) (emphasis added). "I am going to jail" implies an expression of guilt and is akin to a confession. Officer Caudle testified that Defendant asked a question, "if he could have a phone call." (S.T. 52:23-24) (App. pp.). Rather than answering "yes" or "no," Officer Caudle followed up with a *question* – specifically, "why he needed a phone call." (S.T. 53:1-2) (App. pp.). "Why?" is a very open ended question that could lead to a multitude of answers. Before questioning – even with a simple one word question – the officer should have immediately read Defendant his Miranda warning. Or, he simply could have allowed him to place a call, by responding with a "yes."

At trial, Officer Caudle also testified that Defendant "asked [him] if he could have a phone call." (T.T. 60:3-5) (App. pp.). He testified to the jury that Defendant was "handcuffed" at the time and "detained." (T.T. 60:15-17) (App. pp.).

Cleary Officer Caudle's next question "why he needed a phone call" was analogous to an interrogation. (T.T. 60:7) (App. pp.). The alleged response by Defendant, "[h]e said he was going to jail," is highly prejudicial to Defendant. The jury heard testimony about the hand-cuffing and detention of Defendant while his truck was being searched for drugs, then heard what is tantamount to a

confession of guilt, "[I] am going to jail." This statement should also have been suppressed. This case should be remanded and a new trial granted.

II. THE LOWER COURT ERRED WHEN IT IMPOSED A TWO-LEVEL INCREASE FOR OBSTRUCTION OF JUSTICE

Standard of Review

The Courts review construction of the Guidelines de novo. *United States v. Esparza, 291 F.3d 1052, 1054 (8th Cir. 2002).* The Courts review the sentencing court's factual findings regarding obstruction of justice and acceptance of responsibility for clear error. Id. *United States v. Vaca*, 289 F.3d 1046, 1048 (8th Cir. 2002). Great deference is given to the sentencing court's decision to grant an enhancement for obstruction of justice or deny a reduction for acceptance of responsibility. *United States v. Perez*, 270 F.3d 737, 739 (8th Cir. 2001); *United States v. Arellano,* 291 F.3d 1032, 1034 (8th Cir. 2002).

Defendant properly objected to the obstruction of justice enhancement. (Sent. T. 4:2-5, 6:5-20) (App. pp.).

Argument

A defendant is subject to an obstruction enhancement under U.S.S.G. § 3C1.1 if he testifies falsely under oath in regard to a material matter and does so willfully rather than out of confusion or mistake." *United States v. Chadwick*, 44 F.3d 713, 715 (8th Cir. 1995) (citing *United States v. Dunnigan*, 507 U.S. 87, 94, 122 L. Ed. 2d 445, 113 S. Ct. 1111 (1993)). If a defendant objects to an obstruction

enhancement based on perjury, the district court "must review the evidence and make independent findings" that the defendant willfully gave false testimony concerning a material matter in the case. *Dunnigan*, 507 U.S. at 95.

Because a defendant must "willfully" obstruct justice, the enhancement "is appropriate only upon a finding that the defendant had the 'specific intent to obstruct justice, i.e., that the defendant consciously acted with the purpose of obstructing justice.'" *U.S. v. Defeo*, 36 F.3d 272, 276 (2d Cir. 1994).

At sentencing, the district court made a finding that Defendant "did commit perjury at his suppression hearing and the matters listed in paragraph 16" of the pre-sentence report. (Sent. T. 7:22-25, 8:1) (App. pp.).

The "untruthful" testimony paragraph (A) alleges that Defendant testified that there were DOT and ICC numbers on the exterior of his truck when he stopped at the Dallas County weigh station. (PSI pp. 7:para. A) (App. pp.). The court erred in relying on this allegation to enhance Defendant's sentence.

At trial Officer Burke testified, and confirmed with photographs, (exhibit 10 & 11) ,[3] that "[t]here is a California number" on the truck . . . "another number in red" . . . "a VIN number" . . . "a six-digit number that California assigns," all painted on the side of the cab. (T.T. 33:15-25, 34:1-2, 15-17) (App. pp.).

Defendant testified that the "DOT numbers" were on the "side of the truck."

(S.T. 63:7-25) (App. pp.). He described them as being "on the side of the cab" . . . "behind the door." (63:23-25, 64:1-6) (App. pp.). Clearly, there were numbers on the side of the truck. There may have been differing testimony about *which* numbers were on the side of the truck, but this could be attributed to "confusion or mistake" and, not a "specific intent" to obstruct justice.

The "untruthful" testimony paragraph (B) states Defendant testified that his truck had "a screen" that restrained the passenger in the sleeper berth, rather than safety belts." (PSI, pp. 7:para B) (App. pp.). The pre-sentence paragraph alleges that there were photographs which "confirmed" there were safety "belts" that could be seen hanging behind a lifted mattress in the sleeper berth. (PSI: pp. 7:para B) (App. pp.).[4] The court erred in relying on this allegation to enhance Defendant's sentence.

This is an erroneous summation of Defendant's testimony. Defendant testified that "we used the safety belts to sleep." (S.T. 71:11) (App. pp.). "They are on the side of the truck." (S.T. 71:14) (App. pp.). There are "two hooks . . . on the side of the bed." (S.T. 71:19-23) (App. pp.). The "hooks" go to the

[3] The undersigned is unable to make further comment regarding any of the photographic exhibits in this case. The Clerk of Court for the Southern District of Iowa was not able to locate any of the photographic exhibits offered in this case, from both the suppression hearing and trial.

[4] The undersigned is unable to make further comment regarding any of the photographic exhibits in this case. The Clerk of Court for the Southern District of Iowa was not able to locate any of the photographic exhibits offered in this case, from both the suppression hearing and trial.

"safety belts." (S.T. 73:8-9) (App. pp.). Any references to a "screen" were in the form of a question, "Like a screen?" (S.T. 74:14) (App. pp.).

> Q: Would you draw that on the piece of paper? Draw where the two connecting points are.
> A: This is the connection (indicating). Where is my –
> THE INTERPRETER: Like a screen?
> A: Like a screen covers yourself.
> Q: Okay. Where does it hook on the other end?
> A: On a screen and goes over you to hook up on the side of the bed.
> Q: Okay. Is that in front of the bed?
> A: In front of the bed on the top.

(S.T. 74:11-21) (App. pp.).

Defendant further testified that the "safety belt system" is different from a regular "safety belt" because it is "wider" and attaches to the bed. (S.T. 74:22-25, 75:1-14) (App. pp.).

There is *nothing* in Defendant's testimony concerning safety restraints which indicates he intentionally lied or attempted to willfully obstruct justice.

Officer Burke testified that he checked to make sure there was an "occupant restraint." (S.T. 16:6-7) (App. pp.). When he couldn't see "it" laying on top of the mattress, he picked up the mattress. (S.T. 16:8-9) (App. pp.). There was never a clear description by Officer Burke concerning the "occupant restraint" because he did not recall seeing it. (S.T. 26:10-11) (App. pp.).

The "untruthful" testimony paragraph (C) states that because he testified he had no knowledge of marijuana found in the truck, and there were clothing and

other items found near the marijuana, as well as "palm print on the outer wrappings of the marijuana" – he obstructed justice. (PSI, 7:para C) (App. pp.). The court erred in relying on this allegation to enhance Defendant's sentence.

Materials were examined by a fingerprint expert. (T.T. 110:12-21) (App. pp.). Of the four latent fingerprints located on the materials, none matched Defendant. (T.T. 112:13-16) (App. pp.). There were no matching finger prints found on the Saran Wrap. (118:1-4) (App. pp.). The marijuana was wrapped in Saran Wrap [or] plastic wrap. (T.T. 37:16-25, 38:1-3, 42:5-13) (App. pp.). The bag which held a single matching palm print of Defendant, did not indicate where the bag had been, whether it was wrapped around something or had contained anything. (T.T. 119:9-12) (App. pp.).

Further, there were no clothing items in the area where the marijuana was found:

> Q: . . . Is it your recollection that you did not see any personal items, clothes, toothbrush, shoes, socks, anything like that, in this area where the marijuana was found?
> A: In that compartment with those? I don't recall seeing any of that stuff.

(S.T. 35:5-9) (App. pp.).

Officer Burke agreed, that it would be possible for a person to drive all the way from Los Angeles to the Dallas County area and not have a need to open the lid to the sleeper berth. (S.T. 35:10-14) (App. pp.). A reasonable trier of fact could find the testimony of Defendant true. A reasonable trier of fact could find

that the co-defendant, Jesus Mendoza-Gonzales lied to the jury at trial, when he denied knowledge of the marijuana at trial, and believed it was his, all along. (T.T. 70:1-5) (App. pp.).[5]

Holding true to his belief of innocence, is not a willful obstruction of justice. The obstruction of justice adjustment is a sentence enhancement. Thus, the burden of proving the facts necessary to support the adjustment lies with the government. *United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991); *United States v. Williams*, 905 F.2d 217, 218 (8th Cir. 1990), *cert. denied*, 498 U.S. 1030, 112 L. Ed. 2d 678, 111 S. Ct. 687 (1991). The adjustment cannot be given simply because a defendant testifies in his own behalf and the jury disbelieves him. The district court itself must find that the defendant committed perjury before making the upward adjustment. *See United States v. Dyer*, 910 F.2d 530, 533 (8th Cir.), *cert. denied*, 498 U.S. 907, 112 L. Ed. 2d 232, 111 S. Ct. 276 (1990). No enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true. *See* U.S.S.G. § 3C1.1 commentary, application note 1 (defendant's testimony and statements should be evaluated in light most favorable to defendant).

[5] It is also interesting to note here that Defendant did not ask to make a phone call or state that he "was going to jail" and the subsequent statement about amounts of drugs, until after Officer Caudle heard Defendant speaking to his brother in Spanish. (S.T. 53:1-5, 52:22-24). It is just as likely that this was the first time Defendant learned of drugs in his truck and that his response that he needed to make "a phone call" was in response to what his brother, the co-defendant had just told him.

The district court also found that the jury's finding of guilt demonstrated the jury felt Defendant had knowledge of marijuana, and Defendant's testimony to the contrary was perjury. (Sent. T. 8:1-6) (App. pp.). Based on this, an obstruction of justice enhancement was added to Defendant's sentence. (Sent. T. 8:7-9) (App. pp.).

The holding of *Willis, supra*, would also apply to the district court's findings on the issue of a jury finding Defendant guilty, and was clearly erroneous.

Finally, the "untruthful" testimony paragraph (D) states that because Defendant denied that he consented to the search of his truck, at the suppression hearing, which was contrary to what Officer Burke testified to, that an obstruction of justice occurred. (PSI, pp. 7-8:para D) (App. pp.). The court erred in relying on this allegation to enhance Defendant's sentence.

A finding of guilt by a jury alone, is insufficient grounds for an obstruction of justice enhancement, and the district court must make a specific independent finding that the defendant willfully lied about a material matter. *United States v. Benson*, 961 F.2d 707, 709 (8th Cir. 1992). The court there held that, while the enhancement may not be based solely upon a Defendant's failure to convince the jury of his innocence, it may be "based on the experienced trial judge's express finding, based on the judge's personal observations, that [the defendant] lied to the jury." *Id.* See also *United States v. Ogbeifun*, 949 F.2d 1013, 1014 (8th Cir. 1991).

The necessary analysis, calls for an independent evaluation and determination by the court that defendant's testimony was false. *Benson* 961 F.2d at 709. See *United States v. Willis*, 940 F.2d 1136 (8th Cir. 1991). Although the jury adjudicates guilt, the district court is responsible for making findings relevant to the matter of obstruction. *United States v. Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)(internal citations omitted).

The court in the case at hand failed to make an independent evaluation and determination and findings relevant to the matter of obstruction:

> THE COURT: Okay. Well, counsel, having reviewed – of course, I tried this case but did not do the suppression hearing, but having reviewed the defendant's testimony at the suppression hearing and the matters listed in paragraph 16, I think it's fair that he did commit perjury at his suppression hearing before Judge Pratt by making the statements listed in paragraphs (a), (b), (c), (d). And I think clearly the outcome of the trial itself demonstrates that the jury certainly felt he had knowledge of the 122 kilograms of marijuana found in the truck, and I believe his testimony to the contrary was perjury.
>
> And based on my review of all I listened to at the trial, I think he clearly had knowledge of that marijuana. I will find that he did commit perjury, [and] is entitled to the obstruction enhancement . . .

(Sent. T. 7:20-25, 8:1-8) (App. pp.).

The comments by the court do not show that Defendant willfully lied to a material fact in order to obstruct justice and a finding that a sentencing enhancement was warranted, is clearly erroneous. This matter should be remanded and sentencing adjusted accordingly.

III. COUNSEL WAS INEFFECTIVE DUE TO HIS FAILURE TO OFFER PERTINENT EXHIBITS AT TRIAL AND IN HIS FAILURE TO OBJECT

TO THE PRESENTENCE INVESTIGATION CRIMINAL HISTORY INCREASE WHICH INCLUDED A POSSIBLE UNCOUNSELED PRIOR CONVICTION

Standard of Review

The determination as to whether counsel was constitutionally deficient is a mixed question of law and fact. *Flieger v. Delo*, 16 F.3d 878, 886 (8th Cir. 1994). Accordingly, the district court's resolution of claims of ineffective assistance of counsel based on an undisputed factual record, of the sort we now have before us, is subjected to de novo review. *Miller v. Dormire*, 310 F.3d 600, 602 (8th Cir. 2002) (*citing Strickland*, 466 U.S. at 698). We review questions of ineffective assistance of counsel based on an undisputed factual record *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998).

Argument

The Sixth Amendment guarantees the criminal defendant the right to effective assistance of counsel. *Strickland,* 466 U.S. at 686. To state a claim for ineffective assistance of counsel, a petitioner must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id*. at 687-88. "To satisfy the second part of the Strickland test, the petitioner must prove that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.'" *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (*quoting Strickland*, 466 U.S. at 694).

Trial counsel failed to offer even one exhibit of documents pertinent to his defense. Defendant provided documents to trial counsel pertaining to required permits and commercial trucking records. At the suppression hearing Defendant testified:

> I had all of the permits. I had all of them. Even I had other copies that I handed my lawyer. I handed all of the copies that I do have, all of the permits. ICC, DOT number, I had all of them.
>
> (S.T. 84:5-9) (App. pp.).

At sentencing, Defendant testified that he wanted to appeal, "because those charges – many of the things that I have, I could not present them, so I would like to submit an appeal so I can submit some of the things that I had." (Sent. T. 9:19-22) (App. pp.). Trial counsel did not offer one piece of evidence or testimony on behalf of Defendant. Trial counsel was unprofessional and ineffective in the defense of Defendant. But for trial counsel's unprofessional errors, the results of the proceeding would have been different. If the exhibits had been offered, Defendant would have shown that he had the documents which he testified to. This would have changed the outcome of the suppression hearing, trial and sentencing in all respects.

Trial counsel should have objected to an enhancement for criminal history points arising out of convictions indicated in paragraph 51 of Defendant's pre-sentence report. In the final draft of the pre-sentence report submitted to the Court, dated May 2, 2003, under the "Adult Criminal Convictions," paragraph 51, two charges are listed: 1) Robbery, and 2) Grand Theft. The paragraph also states:

> (A) Attorney representation is unknown. However, Section 987 of the California Penal Code, enacted in 1972, requires that defendants be informed of their right to counsel prior to arraignment and that counsel be assigned if defendants are unable to employ counsel. (PSI, pp. 11, para. 51) (App. pp.).

Objecting to the findings of a PSR puts the government on notice that it must meet an additional burden at the sentencing hearing. *See U.S. v. Hammer,* 3 F.3d 266, 272-73 (8th Cir. 1993). If a defendant objects to factual allegations in a presentence report, the Court must either state that the challenged facts will not be taken into account at sentencing, or it must make a finding on the disputed issue. See Fed.R.Crim.P. 32(c)(3)(D). If the latter course is chosen, the government must introduce evidence sufficient to convince the Court by a preponderance of the evidence that the fact in question exists. *Id.* A challenge to this paragraph would have required the government to prove that Defendant had counsel at the state court level. If there had been no counsel, the offenses could not have been used to enhance Defendant's sentence.

Various courts have addressed the issue of whether prior uncounseled convictions may be challenged at federal sentencing on an unrelated case. The court in *Custis* concluded that only denial-of-counsel claims, are excluded from the general rule against collaterally attacking prior convictions used for federal sentence enhancements. See *Custis v. United States*, 511 U.S. 485,494-96, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994)[6] ; *United States v. Montanye,* 996 F.2d 190, 192 (8th Cir. 1993) (en banc) (plain error standard of review).

The 9th Circuit, following *Custis*, determined that a defendant should be allowed to claim that uncounseled prior convictions used to calculate a criminal history, are obtained in violation of the persons Sixth Amendment rights. *U.S. v. Allen*, 88 F.3d 765, 772 (9th Cir. 1996). That would be the case here. Trial counsel should have objected to use of the enhancement. The enhancement resulted in an increase of 3 criminal history points.

Trial counsel was ineffective in his representation of Defendant due to his failure to provide a meaningful defense, or offer available exhibits, and in his failure to object to the use of paragraph 51 of the pre-sentence report. This matter should be remanded and a new trial granted, or in lieu thereof, remanded and the sentence adjusted accordingly.

[6] Although *Custis* concerns section 924(e) rather than the guidelines, most circuits follow it in guideline cases, concluding that a challenge under the guidelines is not legally distinguishable from a challenge under ACCA, which was the challenge in *Custis.* See *U.S. v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996).

IV. THE LOWER COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION FOR ACCQUITAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW DEFENDANT CONSPIRED TO DISTRIBUTE MARIJUANA AND METHAMPHETAMINE

Standard of Review

We review the sufficiency of the evidence to sustain a conviction de novo. *United States v. Cruz,* 285 F.3d 692, 697 (8th Cir. 2002). Citing *United States v. Carper,* 942 F.2d 1298, 1302 (8th Cir. 1991), This issue was properly preserved at trial. (T.T. 133:3-25) (App. pp.).

Argument

There was insufficient evidence to show Defendant conspired to distribute methamphetamine and the government failed in its burden.

To support a conviction for a conspiracy to distribute methamphetamine, the government must demonstrate (1) a conspiracy, including an agreement to distribute controlled substances; (2) defendant knew of the conspiracy; and (3) intentionally joined the conspiracy. *United States v. Romero*, 150 F.3d 821, 824 (8th Cir. 1998). See also *United States v. Aguilar-Portillo,* 334 F.3d 744, 747 (8th Cir. 2003). Evidence must demonstrate defendant entered an agreement with at least an additional individual which had as its object a violation of law. *United States v. Robinson,* 217 F.3d 560, 564 (8th Cir. 2000).

Upon the conspiracy being established any evidence connecting the defendant with the conspiracy is sufficient to prove the defendant's involvement.

United States v. Shoffner, 71 F.3d 1429, 1433 (8th Cir. 1995) (citation and quotation marks omitted).

In the case at hand, there was no testimony offered which showed the existence of any conspiracy. In fact, the Co-Defendant, Jesus Mendoza-Gonzales' (Jesus) entire testimony was to the contrary. Jesus testified that he came with Defendant from Los Angeles to Minnesota, to look for a job working the fields. (T.T. 66:20-25, 67:1-7) (App. pp.).

Jesus was arrested with Defendant on drug conspiracy charges, possession with intent to distribute methamphetamine, possession with intent to distribute marijuana and illegal reentry. (Indictment, T.T. 67:8-9) (App. pp.). Pursuant to a plea agreement, all drug charges were dismissed against Jesus. (T.T. 67:14-22) (App. pp.). As part of that plea agreement, Jesus had to *tell the truth.* (T.T. 67:23-24) (App. pp.) (emphasis added).

Jesus testified that Defendant said he was going to Minnesota to pick up a box for the truck. (T.T. 68:22-24) (App. pp.). He testified that, until he and Defendant were arrested, he knew nothing about drugs in the truck. (T.T. 69:9-25) (App. pp.).

> Q: Before you left on the trip, did Jose tell you anything about drugs being in the truck?
> A: No.
> Q: How was he acting towards you on the trip?
> A: We were fine.
> Q: Did you notice anything unusual on the trip?

A: No.
Q: At some time on the trip, did you find out that there were drugs in the truck?
A: Yes, when they stopped us.
Q: Did you know before then that there were drugs in the truck?
A: No.
Q: Did you ever stop in Nebraska anywhere?
A: Yes.
Q: Did you have a conversation about drugs in Nebraska?
A: No.
Q: Did the Defendant ever ask you to watch his truck for him while he went to the bathroom because there were drugs in it?
A: Yeah. He told me, "Stay here at the truck while I go to the bathroom."
Q: Did he tell you that was because there were drugs in the truck?
A: No. I didn't know at the time.
Q: At some time later did you have a conversation with Jose where he told you there were drugs in the truck?
A. Yeah, but that was when we got arrested.

(T.T. 69:2-25, 70: 1-3) (App. pp.).

* * * * * * * * * * * * * * *

Q: While you were on the trip, did you ever help drive the truck?
A: No.
Q: Did you move any packages of drugs?
A: No.
Q: Did you help load any packages of drugs into the truck?
A: No.

(T.T. 70:25, 71:1-6) (App. pp.).

According to Jesus' testimony, Defendant would have acted entirely alone in the possession of marijuana and methamphetamine.

The testimony of Ricky Carmichael, a jail-house snitch, offered no further evidence, concerning the existence of a conspiracy Carmichael testified that

Defendant "said he lived in California, picked up – went by his house and picked up his brother, and was heading for – was on the interstate and got pulled over in Dallas County, and heading for Minnesota." (T.T. 84:12-17) (App. pp.). He stated that Defendant said "he had 335 pounds of pot, and two pounds of meth." (T.T. 84:18-20) (App. pp.). No evidence concerning the existence of a conspiracy.

The government failed to show the existence of a conspiracy. A good example of what is expected in a conspiracy are set forth in *United States v. Rodriguez-Mendez,* 336 F.3d 692 (8th Cir. 2003). Evidence offered to prove a conspiracy included demonstrating that the defendant was the central link to a broad-based network of suppliers, determined the price of drugs, that he recruited individuals to distribute drugs, and that he intentionally joined the conspiracy**.** *Id.* Having specific members of the conspiracy testify to participation in the conspiracy. *Id* at 696.

The government failed to prove the elements necessary for a conspiracy such that this case should be remanded and a new trial granted.

V. THE LOWER COURT ERRED IN ITS DENIAL OF DEFENDANT'S MOTION FOR ACCQUITAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW DEFENDANT POSSESSED MARIJUANA AND METHAMPHETAMINE, IN VIOLATION OF 21 U.S.C. SECTION 841(a)(1)

Standard of Review

We review the sufficiency of the evidence to sustain a conviction de novo. *United States v. Cruz*, 285 F.3d 692, 697 (8th Cir. 2002). Citing *United States v. Carper*, 942 F.2d 1298, 1302 (8th Cir. 1991), This issue was properly preserved at trial. (T.T. 133:3-25) (App. pp.).

Argument

There was insufficient evidence to show Defendant possessed marijuana and methamphetamine, actually or constructively, with intent to distribute and the government failed in its burden. To establish the offense of possession with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1), the government was required to establish that Defendant knowingly possessed controlled substances with the intent to distribute it. See *United States v. Johnson*, 18 F.3d 641, 647 (8th Cir. 1994) (footnotes omitted). Also, that the defendant "knowingly sold or otherwise transferred the drugs". See *United States v. Rogers*, 91 F.3d 53, 57 (8th Cir. 1996). The courts have said that "knowledge of presence, plus control over the thing is constructive possession." *Johnson* 18 F.3d at 647.

The only record of any evidence which showed Defendant could have had knowledge of the drugs in his truck, was the testimony of a jail-house snitch, hoping for a reduced sentence.

Carmichael testified that Defendant "said he lived in California, picked up – went by his house and picked up his brother, and was heading for – was on the

interstate and got pulled over in Dallas County, and heading for Minnesota." (T.T. 84:12-17) (App. pp.). He stated that Defendant said "he had 335 pounds of pot, and two pounds of meth." (T.T. 84:18-20) (App. pp.).

Carmichael also testified that he "seen some of [Defendant's] paperwork" but didn't recall seeing some of what he testified to there, such as the part about "how [the drugs] was wrapped or anything there. He showed me about – they were talking about the stickers on the truck, and stuff like that." (T.T. 86:5-10) (App. pp.).

Any of the information which Carmichael testified to was available in charging documents which Defendant would have had in his possession while in custody.

The government failed to prove the elements necessary for a knowing possession such that this case should be remanded and a new trial granted.

CONCLUSION

For the reasons state above, this case should be remanded and a new trial granted, due to an illegal search, seizure and interrogation, the government has failed to prove beyond a reasonable doubt that Defendant committed the offenses as charged, there were erroneous enhancements added to Defendant's sentence and due to ineffective assistance of counsel. In lieu of a new trial, this case should be remanded for a correction of sentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rules of Appellate Procedure 32(a)(7)(C), the undersigned counsel certified that this Brief complies with the type-volume limitation because this Brief contains 7,980 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The undersigned counsel further certified that this Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this Brief as been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman font.

As required by Eighth Circuit Rule of Appellate Procedure 28A(d), the undersigned also certifies that the 3 ½ inch computer diskette provided contains the full text of this Brief, has been scanned for viruses, and is virus-free.

_____

Donna M. Schauer, 502-82-5405

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the ____ day of September, 2003, I filed and served, pursuant to Eighth Circuit Rule of Appellate Procedure 28A(a), the foregoing Brief of the Appellant by causing ten (10) copies to be sent via United States Postal Service to the United States Court of Appeals for the Eighth Circuit, and pursuant to Eighth Circuit Rule of Appellate Procedure 28A(d) one (1) diskette to be sent via United States Postal Service to the United States Court of Appeals for the Eighth Circuit, and two (2) copies of the Brief with one (1) diskette to be sent vial United States Postal Service to the following counsel of record:

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CERTIFICATE OF COST

The undersigned certifies that the cost of printing this Brief was $_____.

Donna M. Schauer, 502-82-5405

ADDENDUM

1. Clerk Report of Suppression Hearing
2. Clerk Report of Plea and Trial
3. Clerk Report of Sentencing
4. Final Sentencing Order